ANNALS

OF THE

AMERICAN ACADEMY

OF

POLITICAL AND SOCIAL SCIENCE.

UNIFORM STATE LEGISLATION.

We are living under a fourfold system of law; there is, in every State, (1) the common law of the State as interpreted by its courts; (2) the common law as interpreted by the United States courts; (3) the statutes of the State, and (4) the statutes of the United States.

Can the complication which thus arises be abated? I for one have no desire to touch our system of State and federal government, with the resulting system of State and federal courts; still less have I any desire to touch the federal constitution, or to alter that great principle of local self-government under which our sovereign States legislate for themselves on their own affairs—"a method which so well combines Roman power with Saxon freedom." But by voluntary and simultaneous action—the same action which led to the adoption of the federal constitution—it is hoped that the several States may gradually be brought to enact the same statutes on all purely formal matters, on most matters of trade and commerce, and in general on all those subjects where no peculiar geographical or social condition, or inherited custom of the people demands in each State a separate

and peculiar statute law. In other words, we think that the confusion which results from contradictory statutes may in large measure be obviated without any great modification of the statute law in any one State, by merely passing, under the general head of "acts to promote national uniformity of law," new and simple chapters of laws in cases where the uniform law is different from the law as already existing in the State. In most cases they will be the same; for, other things being equal, we shall, of course, recommend for adoption the law existing already in the greatest number of States.

Now how does this diversity of statute law arise? Let us consider the statute law of the original thirteen States, and the extent to which they have simultaneously adopted the common law of England, and its statutes. The inherited body of English laws, as existing, let us say, July 4, 1776, was already somewhat complex. It consisted: (1) of the common law of England so far as each State had tacitly adopted it as suited to their condition; and further so far as they had expressly adopted it by statute at this or a subsequent time; (2) of the statutes of England, or Great Britain, amendatory to the common law, which they had in like manner, that is, tacitly or expressly, adopted; and (3) of the colonial statutes themselves.

Here we may observe two reasons for diversity: (1) In English statute law, as the States differed very widely in the completeness with which they adopted it, and the date to which they brought such adoption, and (2) the difference existing among the colonies in their own statutes. This, however, is not so great as would be supposed; for nearly all colonial statutes were more in the nature of ordinances, and concerned such matters as the treatment of Indians and the financial system rather than the general common law; and, moreover, after the Revolution there was a distinct tendency to adopt the same laws, even though the colonial laws had differed. For instance, in the case of the inheritance of land, some States had, before the Revolution, the rule of primogeniture, some States—like Massachusetts—gave the

eldest son a double portion; and some States had already adopted, under the lead of Georgia, the system universal at present, by which all children shared equally.

Considering first the common law of England, Franklin said of it, "The settlers of colonies in America did not carry with them the laws of the land as being bound by them wherever they should settle. They left the realm to avoid the inconveniences and hardships they were under, where some of these laws were in force; particularly ecclesiastical laws, those for the payment of tithes, and others. Had it been understood that they were to carry these laws with them, they had better have stayed home among their friends, unexposed to the risks and toils of a new settlement. They carried with them a right to such parts of the laws of the land as they should judge advantageous or useful to them; a right to be free from those they thought hurtful, and a right to make such others as they should think necessary, not infringing the general rights of Englishmen; and such new laws they were to form as agreeable as might be to the laws of England."

The common law of England has, in thirty States, been expressly adopted by a statute of the present State, the statute being adopted in most cases soon after the Revolution. Thus, in Maryland, the people are declared entitled to the common law of England by the Maryland declaration of rights. In twenty-four other States the common law of England so far as applicable and not inconsistent with the constitution and laws of the State, or such part of it as is adapted to the condition and wants of the people, whatever that may mean, is adopted and declared to be in force. In five other States such parts of the common law as were in force in the colony or in the territory previous to the adoption of the State constitution, are declared in force if not inconsistent therewith.

This accounts for thirty out of forty-six States and Territories. Only in Florida and Dakota there is declared to be

no Common Law cases where the law is declared by the codes. In the other fifteen States and Territories the statute-books are silent; but I will presume that in all the Common Law of England prevails; for the only States about which there will be any doubt, namely Texas, Louisiana, New Mexico and Arizona, originally French or Spanish States, belong to the class which have expressly adopted the Common Law. We see, therefore, that there is no great ground for diversity here.

Taking up next the English statutes: Here we find a great diversity. Professor Colby, of Dartmouth, says, * "By English constitutional usage acts of parliament passed after the settlement of any American colony were not deemed to bind it unless it was named therein.† Long before the Revolution public opinion in America ordained and declared that no act of parliament passed after the settlement of any American colony ought to have force therein, even if applied to it in express terms, unless adopted in it, at least, by tacit consent. When, therefore, independence was proclaimed and State constitutions were adopted, English statutes amendatory of the common law, only "so far as applicable and not inconsistent with the laws of the United States or the State" were declared to be in force in the different States. But in this matter the original States, and later the new States, have acted with true English irregularity, and so added to the diversity of the American law."

Indiana, Illinois, the Virginias, Missouri, Arkansas, Colorado and Wyoming, adopt all English statutes which were enacted prior to the fourth year of James I., with certain specified exceptions even there; while Rhode Island and Florida adopt all statutes up to the time of the Declaration of Independence; and Pennsylvania all which were in force on May 10 of the year 1776; and New York, on the

*Address of James F. Colby before Grafton & Coos Bar Association, January 29, 1892.

†Blackstone, Vol. I, p. 108.

other hand, expressly denies any effect to any English statutes in New York since May 1, 1788. Thus, in Pennsylvania practically all English statutes enacted before May 10, 1776, are in force, while in the neighboring State of New York none are.

Nevertheless, I think that the courts of all States—including the vast majority which are silent on this point—do in fact enforce those important English statutes which have grown to be considered as part of the Common Law. I do not believe, therefore, that there is any great cause for diversity here again.

Taking up next the colonial statutes: In Massachusetts there are a great many colonial laws which are very interesting; especially the collection known as the "Body of Liberties," and which have probably some effect on the present decisions of courts in that State; but the bulk of them are of interest rather from the sociological point of view. It comprises ninety-eight sections, the first of which is identical with the civil rights provision of the English Petition of Right to Charles I. Twelve other sections concern similar rights. Section 9 regulates monopolies and patents; and Section 10 declares lands free of all feudal systems of tenure. Section 11 gives power to will; and there are forty other sections concerning "rights at law." Twenty-one sections are called "Laws concerning liberties, more particularly concerning freemen;" four sections concerning "liberties of children," four "of servants," four "of foreigners," while only two consider the "liberties of women."

From a general glance at the Massachusetts colonial laws, it appears that substantially all matters now covered by statute were treated of in them, and also many other matters concerning which statute regulation would now be indefensible; for, as we all know, the Puritan commonwealth interfered with the liberty of the citizen to a far greater extent than we would suffer the State to do nowadays.

As an example of the sort of colonial statute which is still in force to-day, one may mention that statute which was universally adopted throughout the colonies providing that all conveyances of land shall be by deed, and not by livery of seisin; and establishing the relations within which a person may not marry.

The laws of New Hampshire and Rhode Island were much like those of Massachusetts, and are quite as bulky. The laws of Connecticut are still more so. The laws of New York are contained in statutes at large; they are bulky and not digested; but most of them were, after all, mere ordinances or regulations of government; not statutes affecting the common law. In Maryland we find an official volume of English statutes in force running from the ninth of Henry III.—the statute of dower—down to the eleventh of George III.—the renewal of leases; and in South Carolina we find an act of 1712 giving a similar list of the statutes of the kingdom of England, or South Britain, which were in force in that colony, running from Magna Carta ninth Henry III., to the twelfth of William III. This list, curiously enough, is not identical with the Maryland list; but includes a greater number of statutes, although many statutes were adopted in both.

The only constitutional bodies of law which left any trace on our present States, were the Body of Liberties of Massachusetts; and the declarations or bills of rights of Virginia, Rhode Island, and Connecticut, the last of which is claimed to be the first independent constitution ever adopted in writing by an English state. For the most elaborate of all the colony constitutional documents, the celebrated scheme of government drawn by John Locke for the settlement of South Carolina, although printed still in the first volume of that colony's laws, so far as any effect or trace of it now goes, has vanished from the face of the earth.

I have given a few words to this subject of colony laws, for the purpose of showing that with the exception of the

constitutions, the colony laws, though bulky and of great interest, do not in fact usually touch upon the domain of the common law; yet such peculiarities as their statutes had were preserved somewhat in the statutes of the States which succeeded them; and this really is the only original cause of the diversity which we are considering, which has lasted to the present day.

When we come to the statutes of the States since the war of independence, we find great diversity; and it is that diversity which we have to consider, and hope in part to remedy. For, as has been implied already, we think that in the great number of cases there is no reason whatever for this diversity at present; and those are precisely the cases from which the greatest trouble arises. Very little difficulty, for instance, arises from the difference of the statute regulating the descent of land, where there may be a reason for the diversity that exists. The land cannot be carried about from one State to another so as to lead to confusion. On the other hand, conveyances of land may be made anywhere, in the Union or elsewhere, to take effect in any State; and here great difficulty arises from the mere formal differences in the execution of deeds; and these are precisely such differences as seem entirely fortuitous and unnecessary.

Before considering in detail a few of the subjects in which we think uniformity of law may be well attained, we may remark, as bearing on the difficulty of the task, that it is not as if each one of the forty-six States and Territories had a wholly different statute upon any subject. If that were the case, the task would, indeed, be a hard one; but as a matter of fact, I have found upon making a complete and careful examination and comparison of the laws of all the States, that we usually find not more than three or four *different* statutes, in them all, upon any one subject. You will commonly find some twenty States, mostly Northern and Northwestern, following the lead of the State of New

York, and having the same law. The New England States with Ohio and Oregon, will usually form another group. The Western and Pacific Coast States, under the lead of California, will form a third; and while there may be two or three States with anomalous statutes on any one point, you will not commonly find more than three, or, at the most, four differences, if the Southern States happen to be different, upon any one section of a statute in the whole Union. And there are many statutes, such as those upon limited partnership, where the law throughout the whole United States is now nearly identical. This, therefore, would be a very easy subject on which to obtain uniformity; and, at the worst, you have but to bring the minority of the States into harmony with the laws of the majority, provided the laws of the majority are open to no obvious objection.

The diversity, however, even between adjoining States of like conditions is very great. To quote Judge Brewster, of Connecticut,* as to the difference between that State and New York, "we find that in New York, a marriage ceremony, if ceremony it can be called, is valid without the aid of clerical or cival officer; in Connecticut it is not. New York limits absolute divorce to one cause; Connecticut invites discontent by eight. New York has two kinds of divorce; Connecticut one. In New York property descends, so to speak, from child to parent in preference to brother or sister; Connecticut favors fraternal rather than paternal heirship, and the whole law of dower, courtesy, perpetuities and ancestral estate in the two States is entirely different. New York requires two witnesses to a will; Connecticut three. New York abolishes common law trusts and powers, except as defined by statute; Connecticut retains them. New York allows preferences in insolvency assignments; Connecticut treats all general creditors alike. How a notarial seal, especially from over the border, is proved as such in New York, is known only to New York lawyers, if

* Vol. XIV, reports American Bar Association, p. 369.

it is to them; in Connecticut the seal proves itself. A deed in New York must have a seal, but only one witness; in Connecticut a scroll will answer for a seal, but two witnesses are necessary. As for commercial law, from the liability of common carriers to the endorsement of notes in blank, from chattel mortgage to the doctrine of 'retention of possession a badge of fraud,' great diversity exists in the laws of the two adjoining commonwealths. While in the conduct of a suit at law, Connecticut allows an initial attachment on service of process in all cases, in New York the rule is to wait until final judgment before touching the debtor's property. And while in New York the right of trial by jury remains inviolate, in Connecticut the corporation, or other defendant, can take the question of the amount of damages from the jury and try it to the court, by a simple demurrer, innocently so-called."

The reason of this wide diversity in our State statutes enacted since the Revolution, may be traced to two or three causes. Sir Henry Maine has stated that "the capital fact in the mechanism of modern states is the energy of legislatures." Five centuries ago our branch of the race deemed statutory enactments fraught with peril. Hallam in his "Middle Ages"* says: "A new statute, to be perpetually incorporated with the law of England, was regarded as no light matter. It was a very common answer to a petition of the commons, in the early part of this (Edward III.) reign, that it could not be granted without making a new law. . . . This reluctance to innovate without necessity and to swell the number of laws which all were bound to know and obey, with an accumulation of transitory enactments, led apparently to the distinction between statutes and ordinances."

But as Professor Colby, of Dartmouth, aptly remarks in his able address upon this subject, "in the first years of our constitutional history two causes began to work in America

* Vol. III., p. 49.

which together go far to explain the energy of our legislative bodies. The first was the democratic spirit which, after finding literary expression in the writings of the Encyclopædists and bearing its first fruit in the American and French revolutions, engendered the belief that judge-made law is aristocratic and that the popular will should be able to realize its object immediately. The second was the spread, as beneficial results were observed to follow the abolition of certain inherited institutions that had survived their usefulness and the repeal of certain feudal laws whose application tended to despoil the suffering masses for the profit of the wealthy classes, of that most persistent of modern political superstitions, the belief that all human ills may be exercised by the sovereign specific of a legislative, 'Be it enacted.'"

Professor Colby—referring to my statement in my volumes on "American Statute Law" that the yearly product of the legislative bodies of all our States is from four to eight thousand statutes, unkindly cites this fact to illustrate the natural fecundity of low organisms.

I myself found upon the investigation to which I have referred, that the States and territories of the Union may be roughly divided according to their habit of enacting statutes into four classes:

1. Code States, which are Ohio, Georgia, Iowa, Texas, California, Dakota, Montana, Utah and Wyoming, though in several other States the statutes are termed codes. These undertake to substitute codes for the common law.

2. States which go far in what may be termed the *enactment* of the common law, and in *addition*, also, which are: New York, Illinois, Indiana, Michigan, Wisconsin, Minnesota and Alabama.

3. States which are generally inclined to add to, or occasionally to alter, the common law, rather than to enact it over in their statutes; which are Massachusetts, Maine, Kansas, Nebraska, North Carolina, Tennessee, Missouri and Arkansas.

4. The conservative States, which retain the common law most nearly intact; which are New Hampshire, Delaware, New Jersey, Pennsylvania, Kentucky and South Carolina.

We are now prepared to sketch the history of the present attempt at national unification of law, which is entirely based, as I have said, on the voluntary action of the States, which have appointed more or less permanent boards of commissioners for this purpose, who meet from time to time in national conference. This national conference then recommends forms of uniform statutes which each State commission, returning, presents to the governor or the legislature of its own State for enactment. The method is a simple one; but the movement—if successful in any degree—would be the most important juristic work undertaken in the United States since the adoption of the Federal constitution. In the more than one hundred years that have elapsed since that time, there has been no official effort to obtain greater harmony of law among the States of the Union; and it is the first time since the debates on the constitution that accredited representatives of the several States have met together to discuss any legal question from a national point of view. The history of the movement may be briefly stated:

For many years lawyers, and thoughtful students of government, have desired something of the sort; but to Mr. Albert E. Henschel, of New York, belongs the credit of drawing the first bill to create State commissions for that purpose.* This statute provided that the governor should appoint, by and with the consent of the senate, three commissioners who should be constituted a board by the name of "Commission for the promotion of uniformity of legislation in the United States," that it should be the duty of

*In 1888 this bill was introduced by Hon. Cornelius Van Cott in the Senate of New York, and by Hon. Joseph Blumenthal in the Assembly. After three years' effort on the part of Mr. Henschel, backed by such prominent New York lawyers as Mr. William Allen Butler, Professor Dwight, Austin Abbott, Daniel G. Rollins, Henry E. Howland, Noah Davis, William Dorsheimer, and John Cadwallader, such a statute was passed in 1890.

such board to examine the subjects of marriage and divorce, insolvency, the form of notarial certificates and other subjects, and to ascertain the best means of effecting an assimilation and uniformity of the laws of the States upon them. Pennsylvania and Massachusetts followed with similar statutes; that of Massachusetts adding to the New York list of subjects the acknowledgment of deeds, and the execution and probate of wills. The Massachusetts law gave no general commission to examine into statute law generally, as the New York statute did in the phrase "other subjects;" but as most of the States have followed the larger direction of the New York statute, all the commissioners have deemed wise to go with them, so far as subjects were debated in which uniformity was advisable and practicable. The legislature of Massachusetts has, by ratifying this statute and extending the term of the commission for five more years, endorsed their action in so doing. These commissions in all the States serve without pay, though in many of the States an appropriation was made to cover their expenses. The first general meeting was held at Saratoga on the twenty-fourth of August, 1892, at the time of the meeting of the American Bar Association, which body had given great assistance to the movement from the beginning. At this meeting seven States only were actually represented; the States of New York, Massachusetts, Pennsylvania, Michigan, Delaware, New Jersey and Georgia. Mississippi had created a commission, but was not at that time represented in the conference. I regret to say that since then the term of the creation of the Pennsylvania commission has expired; but so far as I am informed, Pennsylvania is the only State which has not maintained permanently such a commission once appointed, and I earnestly hope that the legislature of Pennsylvania may pass a law at its next session re-creating this commission, or extending the term of the previous commissioners, as has been done in both New York and Massachusetts.

The second meeting was held in New York City on the fifteenth of November of the same year and following days. The third meeting was held at Milwaukee, Wis., on August 31, 1893, and the following days. At this meeting the movement had grown from the original seven States to no less than twenty; the States of Connecticut, New Hampshire, Illinois, Wisconsin, Minnesota, Kansas, Nebraska, North and South Dakota, Montana and Wyoming, having in the meantime appointed commissioners.

The fourth conference was held in Saratoga, N. Y., on the twenty-second and twenty-third of August, 1894, in which the States of Iowa and Virginia were also represented commissioners, making twenty-two in all. Since then I have had letters or information from the governor or secretary of state of several other States, among them Kentucky, Ohio, Oregon, Washington, Nevada and Oklahoma Territory, announcing the progress of legislation for similar commissions, so that we hope at the meeting at Saratoga in August this year to have nearly thirty States represented. A bill has moreover recently been introduced in the House of Representatives for the appointment of a similar national commission to be permanent, with paid salaries, which shall co-operate with the State commissioners in this work, as there are many subjects upon which there is also national legislation. This bill is substantially as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that for the purpose of obtaining uniformity of law, and uniformity in the administration of the law, throughout the United States, both in Federal and State courts, there shall be prepared for adoption by Congress, or for submission to the several States, codes of law upon subjects wherein diversity is a hindrance to interstate commerce and an impediment to the prosperity of the country, and codes making simple and uniform the practice of all Federal courts.

SECTION 2. That for such purpose the President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners on the uniformity of laws, whose duty it shall be to prepare codes of the substantive law upon subjects of commercial and

mercantile law, and especially the law upon sales and sellers' liens, stoppage in transitu, the liability of carriers, negotiable paper, the making and execution of deeds, and the law of domestic relations, including marriage and divorce, and upon such other topics of the law upon which it may seem desirable to said commissioners that there should be uniformity throughout the country; and to prepare codes of civil procedure and criminal procedure for the courts of the United States.

SEC. 3. That said commission shall from time to time, as it shall complete drafts of any portion of its work, submit copies of the same to the commissioners of the several States and Territories that have appointed or may hereafter appoint commissioners on uniform laws, for their advice and co-operation; and shall from time to time, as it shall fully complete any portions of its work, report the same to Congress for its action.

SEC. 4. That Congress shall provide for the use of said commission at the seat of government a suitable office, books, stationery and clerks.

It will be seen that this movement has passed beyond the stage of an experiment, and may fairly now be called national. The commissioners have deemed it wise to proceed very slowly and carefully, and so far all the laws recommended by them for adoption throughout the country are contained in one small blue-book. Still less progress has been made in the actual enactment of these recommendations by the legislatures of the several States; partly because the commissioners themselves have deemed it wise to wait until they had been joined, and their recommendations approved, by a large majority of the States; and partly owing to the natural reluctance of any one State to be first in adopting the laws recommended. There is a natural reluctance on the part of any State legislature to change, however slightly, the statutes under which its people live, until at least they feel sure that the object of such change is to be attained by the adoption of the new statute in all the States of the Union. There is also, perhaps, a certain element of short-sightedness or local prejudice which is against making any change in their wonted law, however important be the purpose. We find it commonly said to us by members of the several State

legislatures—and even by members of the national conference of commissioners—"Why, that is not the law in my State," as if that objection were final; even when the State referred to is alone, or almost alone, in its treatment of the law, and the new law, proposed by the commissioners, is identical with that of the bulk of the States. Of course, if objections on this score are to prevail when there is no real objection arising from the circumstances or condition of the people, the whole movement will come to an end. We hope in time, however, as the legislatures and the people understand the value and the purpose of the movement, that these merely local objections will cease to be heard; and the State of Massachusetts, at least, has taken the lead by adopting in the last session of its legislature several of the important new laws recommended by the national conference. All the States in enacting such laws are urged to entitle them, "*An act to establish a law uniform with laws enacted or to be enacted in other States*" for whatever the subject may be. This phrase "uniform law" to serve as a sort of hall-mark, to indicate at once that the statute passed is one of the laws to be adopted in the same words by all the States of the Union, so that the lawyer or student finding the caption "uniform law" at the head of any statute, will understand at once that the provisions of that statute, at least, are universally adopted throughout the country.

At its first meeting at Saratoga, the boards of commissioners of the several States organized themselves into a national conference, and elected as president the Hon. Henry R. Beekman—now Judge Beekman—of New York, and myself as secretary. Mr. Henschel, the permanent paid secretary of the New York commission, being the only paid permanent officer which any board has authority to appoint, has been of great service to the national conference itself.

At the third meeting held at Milwaukee, special permanent national commissions were appointed on the following subjects: Wills, Marriage and Divorce, Commercial Law,

Descent and Distribution, Deeds and Conveyances, Weights and Measures, Certificates of Acknowledgment and Forms of Notarial Certificates, and finally a committee on uniformity of State action in appointing presidential electors. *

All the debates of these four conferences have been preserved by stenographic report, and as showing how carefully and exhaustively they have been considered, I will say that the report of each conference covers from two to three hundred typewritten pages. Of course many subjects have been debated, and many statutes scheduled out which have not yet got into the blue-book which contains the formal recommendations—proposed statutes being only printed in it when there is absolute unanimity upon them in the conference, and they have received the vote of at least two successive meetings.

Many other matters have been earnestly discussed than the blue book contains.

I have said that this is the first time that representatives of the States of the Union have been brought into common debate on questions of fundamental law since the meeting of the Constitutional Convention itself; and it has been interesting to note both how great and how small the changes since that time have been in the characteristics of the several States, and in the views of their citizens upon cardinal questions of civilization. These latter—except so far as we are expressly ordered to do in the case of marriage and divorce

*This latter committee was appointed upon the suggestion of Mr. Buckalew of Pennsylvania; and although it lies almost beyond the scope of the movement to improve merely the common law, and goes rather into the domain of statecraft, its importance is obvious, and it is a good example for that very reason of what this national conference, if permanent, might ultimately hope to accomplish even in the way of improving the form of government under which we live. Its necessity was already present in the mind of Alexander Hamilton, as appears from a letter addressed by him to John Jay; and the danger of the present state of things—apart from the unfairness arising from diversity in the several States—is that the matter being left entirely to the discretion of State legislatures, the law of any one State upon it may be changed in view of any particular election, when the vote of such State will determine the result.

We might have had an example of that in the State of Michigan at the last presidential election, and it is easy to see to what public danger such a condition of things give rise.

—we have not sought to touch. The root framework of society must be left to our forty-four independent sovereign states to determine for themselves; and the results of their determination will probably be more instructive in their very diversity than any inconveniences fairly resulting therefrom are injurious. We have sought to obtain uniformity only in matters purely formal, or in matters like divorce, where from the nature of the case it is impossible for any one State to legislate in such a way as to determine the question beyond its own borders.

The first conference wisely adopted as an order of business to take up the most simple matters first—that is, matters chiefly of form, and to proceed later to matters of substance.

The first and obvious example of a purely formal statute, is that which regulates the acknowledgment to deeds and notarial certificates which are intended to have effect beyond the borders of the State where taken. This matter was debated at the first Saratoga conference, and the succeeding meeting in New York finally disposed of it so far as the national conference is concerned; and a chapter called "a uniform law for the acknowledgment and execution of deeds" was recommended and approved, which has since received the endorsement of all the States in the conference; and has actually been adopted in Massachusetts, and is law in many other States. The statute is as follows:

AN ACT to establish a law uniform with the laws of other States for the acknowledgment and execution of written instruments. Be it enacted etc., as follows:

SECTION 1. Either the forms of acknowledgment now in use in this State, or the following, may be used in the case of conveyances or other written instruments, whenever such acknowledgment is required or authorized by law for any purpose:

(Begin in all cases by a caption specifying the State and place where the acknowledgment is taken.)

1. In the case of natural persons acting in their own right:

On this day of 18

before me personally appeared A B (or A B and C D), to me known

to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed.

2. In the case of natural persons acting by attorney:

On this day of 18 , before me personally appeared A B, to me known to be the person who executed the foregoing instrument in behalf of C D, and acknowledged that he executed the same as the free act and deed of said C D.

3. In the case of corporations or joint-stock associations:

On this day of 18 , before me appeared A B, to me personally known, who, being by me duly sworn (or affirmed), did say that he is the president (or other officer or agent of the corporation or association) of (describing the corporation or association), and that the seal affixed to said instrument is the corporate seal of said corporation (or association), and that said instrument was signed and sealed in behalf of said corporation (or association) by authority of its Board of Directors (or trustees), and said A B acknowledged said instrument to be the free act and deed of said corporation (or association).

(In case the corporation or association has no corporate seal, omit the words "the seal affixed to said instrument is the corporate seal of said corporation (or association), and that," and add, at the end of the affidavit clause, the words "and that said corporation (or association) has no corporate seal.")

(In all cases add signature and title of the officer taking the acknowledgment.)

SECTION 2. The acknowledgment of a married woman when required by law may be taken in the same form as if she were sole, and without any examination separate and apart from her husband.

SECTION 3. The proof or acknowledgment of any deed or other written instrument required to be proved or acknowledged in order to enable the same to be recorded or read in evidence, when made by any person without this State and within any other State, Territory or District of the United States, may be made before any officer of such State, Territory or District authorized by the laws thereof to take the proof and acknowledgment of deeds, and, when so taken and certified as herein provided, shall be entitled to be recorded in this State, and may be read in evidence in the same manner and with like effect as proofs and acknowledgments taken before any of the officers now authorized by law to

take such proofs and acknowledgments, and whose authority so to do is not intended to be hereby affected.

SECTION 4. To entitle any conveyance or written instrument, acknowledged or proved under the preceding section, to be read in evidence or recorded in this State, there shall be subjoined or attached to the certificate of proof or acknowledgment, signed by such officer, a certificate of the Secretary of State of the State or Territory in which such officer resides, under the seal of such State or Territory, or a certificate of the clerk of a court of record of such State, Territory or District in the county in which said officer resides or in which he took such proof or acknowledgment, under the seal of such Court, stating that such officer was, at the time of taking such proof or acknowledgment, duly authorized to take acknowledgments and proofs of deeds of lands in said State, Territory, or District, and that said Secretary of State, or Clerk of Court, is well acquainted with the handwriting of such officer, and that he verily believes that the signature affixed to such certificate of proof or acknowledgment is genuine.

SECTION 5. The following form of authentication of the proof or acknowledgment of a deed or other written instrument when taken without this State and within any other State, Territory or District of the United States, or any form substantially in compliance with the foregoing provisions of this act, may be used.

Begin with a caption specifying the State, Territory or District, and county or place where the authentication is made.

I, , Clerk of the in and for said County, which Court is a court of record, having a seal (or, I, , the Secretary of State of such State or Territory), do hereby certify that by and before whom the foregoing acknowledgment (or proof) was taken, was, at the time of taking the same, a notary public (or other officer) residing (or authorized to act) in said county, and was duly authorized by the laws of said State (Territory or District) to take and certify acknowledgments or proofs of deeds of land in said State (Territory or District), and further that I am well acquainted with the handwriting of said , and that I verily believe that the signature to said certificate of acknowledgment (or proof) is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court (or State) this day of 18

SECTION 6. The proof or acknowledgment of any deed or other instrument required to be proved or acknowledged in order to

entitle the same to be recorded or read in evidence, when made by any person without the United States, may be made before any officer now authorized thereto by the laws of this State, or before any minister, consul, vice-consul, chargé d'affaires, or consular agent of the United States resident in any foreign country or port, and when certified by him under his seal of office it shall be entitled to be recorded in any county of this State, and may be read in evidence in any Court in this State in the same manner and with like effect as if duly proved or acknowledged within this State.

Massachusetts Laws, 1894, Chap. 253.

In this connection, however, we believe that it would be wise for every State to adopt this uniform statute in its own words, in order to remove all question, even when the law set forth in it appears to be identical with the law already existing in such State. In that case it can do no possible harm, and it renders it perfectly clear to any one living in another State which has adopted the same law that the law *is* the same in the two States; for, the slightest change in wording, or even in punctuation, sometimes even in the title of an act, may make a difference in the judicial interpretation of the statute, so that we cannot be quite sure that the law is *really* identical in any two States unless the statute is the same *verbatim et literatim.* Of course it may be urged, even after this, that the courts of the two States may differ in their interpretation of the statute; but we believe that, inasmuch as the statute is identical, the decision of the court of any one State would become almost a binding authority on the court of another State, which has to construe precisely the same statute; so that the decisions of the courts will tend to become as uniform as the law itself.

The next question which came up was of the form of the instrument itself; and first of all that of seals. Now it is obvious that there are two questions concerning seals liable to be confounded. One is, what shall be the nature or form of a seal itself to make it valid as a seal? and the second, what shall be the effect of a seal when there is no doubt about the seal being there?

As this is a useful illustration of what I mentioned as the general stream of legislation upon any subject, I will state in brief what the law on seals now is throughout the country:

As to the effect and necessity of the seal, we find here—as we usually do on most questions—about three ways of treating the subject. The first, or old law, is that all deeds must be sealed by the party executing them, or they will be of no validity. This, as is usual in the case of statutes which are conservative and express the old common law, is followed generally in New England, in New York and in some of the States which usually follow New York law, and also in South Carolina and Florida, being sixteen States in all. In Massachusetts there is no statute on the subject; but it is held to be the common law without a statute, and I presume such is the case in Pennsylvania.

Then the second way of treating the subject is the absolutely radical, which abolishes the use of private seals entirely. This is generally the law in the Western States, following the lead of Ohio, and in Kentucky, Tennessee, Mississippi and Texas—fifteen States in all.

Then we have a third way which holds the middle ground between the two—that is, not to require a seal but to give it effect as importing consideration, thus making a sealed instrument of higher value than a simple written contract, because you do not have to prove any consideration for it. This is the law of California and a few States following it.

These are the only three ways of treating seals found in the laws of all the States, with the exception only that we find—as we often do—one anomalous State, namely Alabama, which has a statute that a seal is not necessary to convey the legal title to land so as to enable the grantee to sue at law; whatever that statute may mean.

Now as this is, in a sense, a more substantial matter than the mere formal characteristics of the seal, the conference have so far contented themselves with recommending the form of the seal; for on the substantial question whether the

use of seals should remain in the law at all, they found, as they always did in such cases, such great and decided difference of opinion in the various sections of our country, that it seemed unwise at the beginning to attempt to reconcile them. But when they came to the mere form of seals, they found it easy to obtain unanimity, and the conference unanimously voted to recommend besides a seal impressed upon or affixed to the paper, that the word "seal" or the letters "L. S.," written or printed, should be sufficient; the conference considering that the main point was rather whether the maker of the instrument intended it to be a sealed instrument than the physical device that he used to make it so. And following this line of argument, the conference were not willing to recommend that a mere scrawl of the pen should take effect as a seal, as it does in some States, for the very reason that in that case it is often difficult to tell whether the intention of the maker was that it should be a seal or not; that is, whether it was meant as a seal or a mere flourish. The statute is as follows:

A UNIFORM LAW RELATIVE TO SEALING AND ATTESTATION OF DEEDS, ETC.

AN ACT Relating to the Sealing and Attestation of Deeds and Other Written Instruments.

(Enacting Clause.)

SECTION 1. In addition to the mode in which such instruments may now be executed in this State, hereafter all deeds and other instruments in writing executed by any person or by any private corporation, not having a corporate seal, and now required to be under seal, shall be deemed in all respects to be sealed instruments, and shall be received in evidence as such, provided the word "Seal" or the letters "L. S." are added in the place where the seal should be affixed.

SECTION 2. A seal of a court, public officer or corporation may be impressed directly upon the instrument or writing to be sealed, or upon wafer, wax, or other adhesive substance affixed thereto, or upon paper or other similar substance affixed thereto by mucilage or other adhesive substance. An instrument or writing duly executed in the corporate name of a corporation, which shall not have adopted a corporate seal,

by the proper officers of the corporation under any seal, shall be deemed to have been executed under the corporate seal.

The next subject which the conference has thus far treated is that of the execution of wills. The present law of some States is that, for instance, a will executed by a New York man may nevertheless not be valid if it be executed out of the State according to the law of that State; while, on the other hand, a will executed by a New York man in New York according to the law of New York, may not be valid as to real property he owns in Pennsylvania.

Most of the States, however, have in fact adopted the simple statute which the commission recommended, which makes a last will and testament, executed outside of any State in the mode prescribed by law, either of the State where it is executed or the State where the testator lives, equally valid in both States; and as to the probate of wills, a similar statute was recommended that any will duly proved without any State but in the State where the testator lives, may be duly admitted to probate in such other State by filing an exemplified copy. Both these statutes are the law already of the bulk of the States, and are very good examples of a case where unanimity of law throughout the entire country may, we hope, be obtained with very little friction.

Another subject which the conference took up was that of the weights of the legal bushel or barrel. It may be a surprise to some to learn that while the size of the bushel is universally the same, dealers in grain, coal and many other commodities are practically controlled by the law which fixes that the bushel of any particular commodity must weigh so much. For instance, the price of Indian corn now varies as you buy it in New York or New Jersey; so a bushel of oats is 30 lbs. in New Jersey, and 32 lbs. in New York. This results in great confusion, and in great chance of fraud among merchants and dealers, it being uncertain in a contract what kind of a bushel was meant, and many dealers not, perhaps, being aware of the difference in other States at the time the

contract was made. We have accordingly recommended a law which shall fix the size of the barrel, of the hogshead, of the dry and liquid gallon, and of the bushel in heap measure; and shall fix the legal weight of a barrel of flour and a barrel of potatoes, and of the bushel of some twenty important commodities, beginning with wheat, corn, rice and grass-seed. The weights recommended are those in fact now adopted in the majority of the States, and this table has been cordially endorsed by the Boston Chamber of Commerce and as a consequence the statute was duly enacted last year in Massachusetts—Massachusetts being one of the States which had previously no statute whatever on the subject.

We have now entered the domain of commercial law; but the only other subject which the conference has thus far taken up is that of days of grace and the presentment of bills and notes. They have recommended the abolition of all days of grace; but this statute, though duly enacted in New York, failed of enactment in Massachusetts, owing largely to the prejudice of the country people. It is perfectly obvious that nothing has been gained to the borrower by making a note that is due in sixty days run for sixty-three, for he has to pay the additional interest on the three days. The only practical consequence is to complicate bank accounts, and to bring on much uncertainty and even considerable danger as to the duty of banks in forwarding bills and notes which are payable in some other State.

But the whole subject of commercial law is one in which there may be much difference of opinion as to the wisdom of attempting a universal codification. We are all agreed that the few important short statutes concerning notes and bills should be generally adopted. In most States these are very brief, the statute concerning them containing in the State of Massachusetts for instance, only thirteen sections, about one page and a half; and in some other States it is still briefer. In California and the code States generally, there is an elaborate code of some

thirty or forty pages on the subject. Opinions vary greatly among the commissioners themselves. Judge Brewster, of Connecticut, for instance, is of opinion that an exhaustive commercial code should be recommended by the commissioners and adopted by all the States. The New York code on the subject contains five chapters, with some thirty articles, and would probably cover six or eight pages of an ordinary statute book. Mr. Field's International Code contains on the subject of bills of exchange some sixty articles, largely definitions. Judge Chalmers, of England, has written a treatise on the law of bills, notes and checks in the form of a code which contains ten chapters, and 278 articles, which would probably fill at least thirty pages of an ordinary statute book. This code was recommended for adoption as a uniform statute at the last Saratoga conference. I myself have prepared a chapter which embodies all the important statutes now usually existing on the subject in the States of the Union, and contains only nineteen sections, and could be put in two pages of an ordinary statute book; thus being almost as short as the Massachusetts chapter, while far more comprehensive. It does not, however, concern itself with definitions or elaborate statements of the law merchant, but approximates most closely to the statute on the subject as it actually exists in most of the States of the Union at present.

This, therefore, with the cognate subject of bills of lading and warehouse receipts, is a very good example of a most important subject upon which there is much difference in present legislation, and much difference of opinion among the State commissioners and experts on the subject generally.

This is as far as the conference have proceeded, with the exception of the subject of marriage and divorce, to which reference shall be made later; but it may be useful to put on record a brief list of those subjects in which it seems wise to attempt national uniformity, with a brief mention of a few where it is quite out of the question.

Valuable work on the subject of conveyances is still to be done. For instance, simple forms of deeds, warranty and quit-claim, of leases, and of real estate covenants may be enacted by statute in all the States as they have been in some, so that any man may buy at a law stationer's a brief and simple deed which he knows will be valid throughout the Union, and will have the same effect everywhere.

This has been expressly urged upon us by Messrs. Lombard, McNeil and Turner, of Chicago, authorized representatives of the National Real Estate Association, who appeared before us at the Milwaukee meeting to urge that real estate men had a direct interest in the adoption of a uniform system of conveyancing, and to request the conference to recommend the adoption in all the States of a simple statutory form which might be used in addition to the more cumbrous common law conveyances already existing. They showed us that in States that had adopted such statutory forms, these forms were so much preferred, that they had gradually come into almost exclusive use.

On the other hand, I think it would be quite unwise to touch the land law generally; by defining, for instance, the law of freeholds and fees, or uses and trusts, or the rules of descent. The latter, particularly, is a question which should be left to the people of each community to settle according to their ideas; and although, as Judge Brewster points out, real estate in New York goes to parents in the absence of children, and in the adjoining State of Connecticut goes to the brothers and sisters, I doubt not there is an historical reason for that fact; that such is the preference of the people of those two States, and that it would be unwise for either the State or the commissioners of the national conference to interfere.

The same may be said of uses and perpetuities, of the amount that a man may devise in charity, and of charitable trusts generally. The Louisiana law, for instance, following the French code, strictly limits the proportion of his property

which a man may bequeath to others than his children or other heirs. To a limited extent the law of New York does the same thing; and it is clearly a matter which the people of every State have entire right to settle for themselves.

Powers of attorney, on the other hand, and more particularly the laws of mortgages, it would seem very wise—in those days when many individuals and nearly all corporations are loaning money on land in other States of the Union—to bring to some sort of unanimity. At present the rights of the mortgage investor vary widely. In Minnesota and other States, he has—we may almost say—no advantage whatever over an ordinary judgment creditor except a kind of priority of attachment; and in some respects has not even so much advantage, as he has practically no remedy whatever against the debtor, but only against the property mortgaged. Of this he cannot even get possession for more than a year after default, during which time the borrower enjoys the fruits of the mortgaged property, while the lender has to pay all taxes and insurance; and in the meantime the property itself goes to rack and ruin, because nobody can safely pay for repairs. In contrast to States like Minnesota and Kansas, the law of Massachusetts, is almost too harsh against the borrower; the lender being allowed to sell the property on a few weeks' notice by publication in any newspaper—a notice which may well never reach the eye of the borrower—and without any redemption. Thus it happens that a citizen of Massachusetts who lends money on mortgage may suppose he is getting the full security of the property besides a personal liability; while a citizen of Minnesota who borrows the money on mortgage knows very well that he is giving no personal security and that of the property only after much delay and expense to the borrower.

The probate and execution of wills has already been treated by the conference, and I doubt if there is anything more to do in this direction, save that all the States

might agree on the same. It is clear that the general law regulating the interpretation of wills is in most of the States *judicial* (or court-made) law, and may not wisely be interfered with by statute. For the same reason as in the case of the descent of land, it would not probably be wise for the national conference to attempt to interfere with the laws concerning dower, or the widow's or husband's rights in property. In some Western States, following the old New York colony law, there is a community of property in the husband and wife, an institution which is peculiar to them; and which, I believe, works very well. It would be useless to advise them to give it up, while the older States would probably be slow to adopt the novelty.

When we come to personal property, however, there are many more subjects which may wisely be treated. For instance, the general law of choses in action, of the assignment of personal contracts, pledges of stock, bills of lading, warehouse receipts. Georgia and one or two other States have adopted a complete code on the subject of contract—that of Georgia following Mr. C. C. Langdell's work; but I think the bulk of legal opinion is still against general codes; and for this reason, if for no other, the conference will not recommend it.

On the other hand, the statute of frauds is already so nearly identical in all the States, that it would require hardly an hour's work of a skillful draughtsman to make it actually so, and this should certainly be done. The same may be said of the law of limited partnership, or warehouse receipts, factors and consignees' acts; and, as I have said, of bills and notes.

Laws governing the rate of interest and usury, however, must necessarily vary in the different States according as their normal rate of money is high or low. The North and East seem to be generally in favor of repealing all usury laws of any kind; but you will never get the South or West, or, as it appears, even the New York legislature to think so.

Lastly, the law of corporations is undoubtedly one of the

subjects most needing uniformity; but, with the exception of marriage and divorce, there is no subject wherein uniformity is more hopeless. The laws of adjoining States vary from laxity to extreme severity, giving corporations indefinite powers, or limiting them to hardly any. Not only that, but the law of the State of New York has recently undergone a complete and radical change from a previous law which limited corporations almost as strictly as do the laws of Massachusetts, to a law which is almost as liberal as that of New Jersey and West Virginia. Yet it seems to me that two or three cardinal propositions might be adopted in all States to the benefit of the country generally:

First. That the capital stock of all corporations should be paid for in cash at par, and proper State regulations made to see that this was carried out.

Second. That this capital should be maintained unimpaired, and

Third. That the indebtedness of no corporation should exceed the amount of its capital stock.

This is already the law in many States, and would inure to the great benefit both of investors and creditors throughout the Union if it could be made general.

Fourth. There is then the important question of the transfer of stock. I think, in view of the number of loans which are in modern times based on a pledge of stock by delivery of the certificate, that this delivery should be made, as it now is in Massachusetts, Rhode Island, and many States, sufficient to hold the stock in the hands of the person advancing the money on it as against any attaching creditor on the books of the corporation.

And, finally, it is clear to me that corporate trusts, which permit the severance of the entire voting power from the real ownership of the stock, and which result consequently in that worst of conditions—power without responsibility—should be forbidden by statute in all the States; and in the same direction that the voting upon proxies should be

strictly regulated, and that all proxies should expire—as they have to in New York—at the end of a limited and brief period. The law of New York allows a proxy to last eleven months, while that of Maine, which requires them to be dated thirty days before election, seems to give sufficient time.

In criminal law it may be doubted whether any effort to bring the States together may wisely be attempted. Yet Judge S. M. Cutcheon, chairman of the Michigan Commission, quoting from the well-known penologist, Mr. Frederick H. Wines, shows by numerous citations from criminal codes the great inequality in the punishment of the same class of crimes when committed in the several States.* He finds, for instance, the death penalty is in force as follows: For murder in all the States except Rhode Island, Michigan, and Wisconsin; in Louisiana, for rape, assault with intent to kill, administering poison, arson and burglary; in Delaware and North Carolina, for rape, arson and burglary; in Alabama, for arson and robbery; in Georgia, for rape, mayhem and arson; in Missouri for perjury and rape; in Virginia, West Virginia, South Carolina and Mississippi, for rape and arson; in Florida, Kentucky, Tennessee, Texas and Arkansas, for rape; in Montana, for arson of dwelling by night; in Maryland, for any variety of arson. The maximum penalty for counterfeiting in Delaware is three years; in Maine, Massachusetts, New York, Florida and Michigan, it is imprisonment for life. In Missouri the minimum penalty is five years, which is the maximum in Connecticut. For perjury the maximum penalty is five years in New Hampshire, Connecticut and Kentucky, but in Maine, Mississippi and Iowa it is life imprisonment, and in Missouri it is death, if the witness committing perjury thereby designs to effect the death of an innocent person, while in Delaware the crime is so lightly regarded as to be punishable only by a fine of not less than $500 nor more than $2000.*

*Publications of the Michigan Political Science Association, No. 3, p. 1, December, 1894.

But among all the subjects considered that of marriage and divorce arouses the greatest difference of opinion, and this is obviously the most important subject with which the commissioners can deal, while it is also a subject with which they are expressly directed to deal. The present movement itself grew largely out of the efforts and agitations of the several State and national divorce and moral reform leagues. There is no subject upon which uniform law has been so much desired, and none in which any definite uniform statute will be so much criticised; yet, the statutes creating all these State commissions ordered them to take up the subject of marriage and divorce; and some progress, even in these subjects, has been made. The conservative distinction here would perhaps be that so far as the *forms* go, the ceremony or want of ceremony, the perpetuation of evidence of marriage, and so far as the mere procedure, service of process, jurisdiction, and effect of divorce are concerned, a uniform law may hopefully be attempted; but when it comes to legislation on the *causes* which are sufficient for divorce, on the existence of divorce itself, and the nature and restrictions of the marriage contract—these matters go too deeply into the essentials of life to be taken out of the regulation of the States for themselves, even by a voluntary and concerted action on their part. As all shades of opinion are doubtless represented in the United States, from those who would have no marriage, those who would have it an ordinary civil contract, revocable like other civil contracts by consent of both parties, to those who would have it a sacrament, a state or a finality, so most of these opinions were represented in the conference. The only subject upon which the conference really agreed was that it should at least be made perfectly clear in every State what a marriage is, when it happens, and how its evidence shall be perpetuated.

The special point about which the tide of discussion ebbed and flowed was the so-called "common-law marriage," or Scotch marriage, marriage by consent, marriage *de facto*, or,

as the extreme conservatives would call it, marriage which is not marriage at all. A strong general prejudice in the South and West in favor of making marriage as easy as possible was met by an equally strong determination in the North and East that people who were about to marry should understand and realize the fact at the time that so important an event in a man's life should at least leave behind it some trace which could be a test to his collateral heirs, his descendants, his widow, and most particularly to his later alleged wife. The common-law marriage, or marriage by mere cohabitation, was declared ingrained in the manners of the people of one section of the country, while the necessity of a church ceremony, or at least some civil act adequately representing it in formality, was declared equally a corner-stone of the civilization of the Puritans. It was, perhaps, a depressing inference to draw that the chief anxiety of our older civilization appeared to be how to avoid marriage, while that of the newer country was rather how most easily to incur it. It may well be imagined that the conference wisely abstained from recommending anything radical on the subject. Recognizing the impossibility of keeping the sexes entirely apart, the conference only endeavored to devise a means of making the parties clearly state under what relation they came together. The result was the following resolutions, which were adopted on the subject of Marriage and Divorce:

MARRIAGE.

"*Resolved*, That it be recommended to the State Legislatures that legislation be adopted requiring some ceremony or formality, or written evidence, signed by the parties, and attested by one or more witnesses, in all marriages; provided, however, that in all States where the so-called common law marriage, or marriage without ceremony, is now recognized as valid, no such marriage, hereafter contracted, shall be valid unless evidenced by a writing, signed in duplicate by the parties, and attested by at least two witnesses.

"*Resolved*, That we recommend to the several Legislatures further to provide that it shall be the duty of the magistrate or clergyman

solemnizing the marriage to file and record the certificate of such marriage in the appropriate public office.

"*Resolved*, That in cases of common law marriages, so-called, evidenced in writing, as above provided, it shall be the duty of the parties to such marriage to file or cause to be filed such written evidence of their marriage, in an appropriate public office, within ninety days after such marriage shall have taken place, and that a failure so to do shall be a misdemeanor.

"*Resolved*, That it be further recommended to the Legislatures that in case the certificate last mentioned be not filed as aforesaid, or if no subsequent ratification by both parties, evidenced as aforesaid by like writing, be filed, then neither party shall have any right or interest in the property of the other.

"*Resolved*, That we recommend to all the States that stringent provision be made for the immediate record of all marriages, whether solemnized by a clergyman or magistrate, or otherwise entered into, and that said provisions be made sufficiently stringent to secure such record and the full identification of the parties."

It was strenuously declared—and this at least seemed to meet the general approval—that a person who incurred the obligation of marriage should surely be required to go through the same formality required of him when he obligated himself for goods and merchandise to a greater value than ten pounds sterling. Accordingly, it was declared that a marriage without minister, ceremony, or witnesses, without bell, book and candle, without record and without acknowledgment, should at least be evidenced by a scrap of paper signed by both parties, so that the question, if it ever came to trial, might be transferred to the simpler studies of forgery rather than the more complex investigations of what Solomon termed the ways of a man with a maid. And the New England delegates further carried their point to the extent of getting a recommendation, in the form of statute, to all the States that provision be made for the immediate record of marriages, however solemnized, or when not solemnized at all,—it being held by them that the question of matrimony was of greater general importance even than that of the proper ownership of an acre or so of wild

land. These matters were pretty unanimously passed; but when the much-vexed question of the age of consent, so-called, arose, there was, after the most heated debate, very far from a decided vote upon the question. Many of the commissioners were unwilling to touch upon the subject at all. Others said that they were particularly charged by their State legislatures to take action upon this, and that on no other one thing was there so great a public expectation that something should be done. Attention was duly called to the fact that the very words, "age of consent," may mean entirely different things, according as the statutes or laws of a State regard the breach of this provision. For instance, it makes a great difference whether an attempted marriage between parties, one of whom is under the age of consent, is to be declared no marriage at all, even when followed by the birth of children, or whether it merely subjects the elder party to a sort of judicial reprimand, or renders the magistrate or clergyman liable to a five-dollar fine, or enjoins upon him the duty of not marrying them unless one or both parents be present.

The conference recognized this difference, but still decided that they could not presume to go into the manner in which separate States interpreted their own regulations; and the debate was limited to the fixing of the age of consent, without deciding what the term meant. All classical literature would appear to show that the age of consent, from the Garden of Eden down, would necessarily and solely mean that age at which the woman consented; and certainly the descendants in all cases would strenuously stickle for that theory, it being equally in accordance with common-sense, the Bible, and the manners of the most polite courts. Nevertheless, all the States of this country, and indeed the common law, have established an age of consent. The common law takes the liberal latitude of anything above twelve and fourteen. Now there is undoubtedly a very earnest desire on the part of many of our best people—many of those whose

wishes are most to be considered in matters of this sort—that the common law rule should be made less liberal. Probably no one would wish to put it higher than eighteen in the woman and twenty-one in the man; but from within this range there are many opinions for all possible ages.

As a result, the conference suggested the age of eighteen in the male, and sixteen in the female. Undoubtedly there are climatic reasons for not making this rule the same in all parts of the country; nevertheless, the difficulty of establishing a sort of Mason-and-Dixon's line on the ability to marry will be obvious to the most flippant observer. The recommendation, as a recommendation, does no harm; but the reader will probably think that it had better stay a recommendation, that the several States, while perhaps increasing the common law age, should nevertheless be left to determine such precise needs as their own experience warrants, and that in all States no marriage should be impeached for nonage which is followed by the birth of a child. One may apprehend in all seriousness that the question of marriage and divorce cannot be settled. This is not saying that it is not well to agitate it and improve the laws where we see them at fault,—notably in matters of divorce; and on this point the conference made the following recommendations:

"*Resolved*, That it is the sense of this Conference that no judgment or decree of divorce should be granted unless the defendant be domiciled within the State in which the action is brought, or shall have been domiciled therein at the time the cause of action arose, or unless the defendant shall have been personally served with process within said State, or shall have voluntarily appeared in such action or proceeding.

"*Resolved*, That where a marriage is dissolved both parties to the action shall be at liberty to marry again."

This will at least prevent what is undoubtedly the greatest abuse now, namely, the procuring of divorces easily and without publicity in foreign States, which have no proper jurisdiction, and without notice to the defendant party, who is usually, in such cases, the innocent party. But it would

seem that the question of marriage is one which not only varies at a given time in different sects, in different communities, in different civilizations, and in different races, but is one upon which any one community is not at a point of stable equilibrium. Unquestionably this most important relation is undergoing a change, a change at least in the point of view from which it is regarded, if not in the statutes embodying it. Democracy, the modern view of property, the other modern movement,—which only began with Mary Wollstonecroft in the early part of this century, and is known as the emancipation of women,—is certainly, in its last result, not going to leave the relation of the sexes where it found it. And, yet, so far, there has been on the statute book very little change. All the debates of conferences such as this, while interesting, as the conversation of any intelligent person must be on this subject, are nevertheless entitled to little more consideration than—perhaps not so much as—that great unconscious public sentiment, which does not rise to that point of conscious intellectual consideration, but which, behind the manners and movements of mankind, dominates the action of humanity, forms society, and only afterward appears in laws and statutes.

FREDERIC JESUP STIMSON.

Boston.